



EMPLOYMENT TRIBUNALS (SCOTLAND)

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**Case No: 4103605/2022 Expenses Hearing in Chambers at Edinburgh on 27
July 2023**

Employment Judge: M A Macleod

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Mr C G de Oliveira

Claimant

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The City of Edinburgh Council

**First Respondent
Represented by
Ms K Sutherland
Solicitor**

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Katy Miller

**Second Respondent
Represented by
Ms K Sutherland
Solicitor**

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30 **Pat Brack**

**Third Respondent
Represented by
Ms K Sutherland
Solicitor**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

40 The Judgment of the Employment Tribunal is that the first respondent's
application for expenses against the claimant is granted; and that the
claimant is ordered to pay to the first respondent the sum of Three Thousand
Nine Hundred and Seventy One Pounds (£3,971).

ETZ4(WR)

REASONS

1. In this case, the Tribunal issued a Judgment which was sent to the parties
5 on 10 May 2023, in which the claimant's claim was struck out in full.
2. On 7 June 2023, the first respondent made an application under Rules 76
and 77 of the Employment Tribunals Rules of Procedure 2013 for expenses
against the claimant.
3. The claimant has not responded to this application.
- 10 4. The Tribunal wrote to both parties to obtain their consent to deal with the
matter on the basis of written submissions alone. The claimant, again, did
not respond to this correspondence, but the respondent accepted that it
would be appropriate to do so.
- 15 5. I set out below the terms of the application, and the submissions made by
the respondent in support thereof; the relevant law; and the decision to
which I have come, with reasons.
- 20 6. There has been no input from the claimant into these deliberations. It is not
clear why the claimant has not responded to any correspondence but I have
sought to take into account what his position has been understood to be in
these proceedings.

The Application and Submissions by Respondents

7. In this case, the application is made under Rule 76(1) of the Employment
Tribunals Rules of Procedure 2013, which provides:

25 *"A Tribunal shall make a costs order..., and shall consider whether or to
do so, where it considers that -*

*(a) a party (or that party's representative) has acted vexatiously,
abusively, disruptively or otherwise unreasonably in either the bringing
of the proceedings (or part) or the way that the proceedings (or part)
have been conducted; or*

(b) any claim or response had no reasonable prospect of success..."

8. Ms Sutherland, the respondent's solicitor, set out the grounds for the application by referring, firstly, to paragraphs 53 to 69 of the Judgment in which the claimant's claims were detailed.
- 5 9. She maintained that each of the claimant's claims had no reasonable prospect of success, and supported this submission by reference to paragraph 70 of the Judgment.
- 10 10. She moved on then to argue that a separate finding should be made under Rule 76(1)(a), on the basis that the claimant acted vexatiously and/or unreasonably in bringing his claims. She said that the respondent incurred significant expense in preparing for and responding to the "hopeless claims", and she cited the 2 case management Preliminary Hearings on 12 September and 14 December 2022, and the Open Preliminary Hearing on 26 April 2023, as well as the additional information provided by the claimant which the respondent had to consider and amend its response.
- 15 11. It was unreasonable and vexatious to bring these claims which were lacking any reasonable prospect of success, she submitted, and while the claimant was unrepresented, he had raised 4 claims in total against the first respondent since May 2021, of which this is the fourth.
- 20 12. She stated that the first claim, no 4109715/2021, was struck out on the basis of want of jurisdiction by Judgment of 8 November 2021; the second claim, no 4112526/2021) was struck out in a Judgment dated 8 August 2022 on the basis that the claim had no reasonable prospect of success; and the third claim (4101091/2022) was similarly struck out for having no reasonable prospect of success by Judgment dated 6 February 2023.
- 25 13. Ms Sutherland then placed reliance upon the terms of the Judgment in this case, pointing to the findings and conclusions set out in paragraphs 76 to 96.
- 30 14. She then confirmed that the first respondent had incurred legal fees of £3,500 plus VAT in relation to the claim up to Judgment, and expected to

incur further legal fees of £1,500 plus VAT in relation to the application for expenses.

5 15. On 21 July 2023, Ms Sutherland wrote to the Tribunal to provide supporting documentation in relation to the first respondent's expenses application, together with submissions.

16. The Schedule of Expenses set out the figures which the first respondent seeks to recover, amounting to £3,971, and included copies of invoices in support of that Schedule.

10 17. The submissions presented expanded upon the application made and made reference to the Rules of Procedure and certain authorities. It is not considered necessary to lay out these submissions in any detail but they were taken into full account in reaching the decision below.

15 18. No response has been received by the claimant to the application nor to any of the subsequent correspondence either from the Tribunal or Ms Sutherland.

The Relevant Law

19. In this case, the application is made under Rule 76(1) of the Employment Tribunals Rules of Procedure 2013, which provides:

20 *"A Tribunal shall make a costs order..., and shall consider whether or to do so, where it considers that -*

(c) a party (or that party's representative) has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings (or part) or the way that the proceedings (or part) have been conducted; or

25 *(d) any claim or response had no reasonable prospect of success..."*

20. The Tribunal had reference to the case of *Dyer v Secretary of State for Employment EAT 183/83*, in which it was held that "unreasonable" had its

ordinary meaning in English, and has not to be interpreted as if it meant something similar to “vexatious”.

21. **Yerrakalva v Barnsley Metropolitan Borough Council and anor 2012**

5 **ICR 420, CA** is a case in which the Court of Appeal held that costs should be limited to those which have been “reasonably and necessarily incurred”.

22. Rule 84 of the Employment Tribunals Rules of Procedure 2013 provides that the Tribunal may have regard to the paying party’s ability to pay when deciding whether or not to make an expenses order but is not obliged to do so.

10 23. The Employment Appeal Tribunal in **Sumukan (UK) Ltd and anor v Raghavan EAT 0087/09** provided that when making an order for expenses, the Tribunal should set out (1) on what basis - and in accordance with what established principles - it is awarding any sum of expenses; (2) on what basis it arrives at the sum; and (3) why expenses are being awarded
15 against the party in question.

Discussion and Decision

24. In light of the applications made by the first respondent, it is necessary to address each application in order to determine whether or not expenses should be granted.

20 25. Firstly, I considered whether the claimant acted vexatiously, abusively, disruptively or otherwise unreasonably in the bringing or conducting of the proceedings.

26. In doing so, I place reliance upon the findings which I have already reached in the Judgment striking out the claimant’s claims.

25 27. In my view, I require to consider both whether the raising of the proceedings amounted to vexatious, abusive, disruptive or otherwise unreasonable behaviour, and also the conducting of the proceedings.

28. In raising the proceedings, I consider that the fact that the claimant has engaged in litigation on 3 separate occasions before he presented this claim

to be of significance. Not only have those previous claims ended in strike out, either because they lacked any reasonable prospect of success or because they had already been determined by the Tribunal, but the claimant must also be well aware that the Tribunal has dealt with those claims, and has set down in unambiguous terms the reasons why his claims have previously failed. He has, undeterred, proceeded to raise this claim against the same first respondent, and in so doing, it is my judgment that he has acted quite unreasonably. In effect, he has chosen to ignore or dismiss the previous findings of the Tribunal.

29. Owing to the fact that he did not attend at the Preliminary Hearing which led to the strike out of this claim, it is not possible to understand why the claimant considered himself entitled to proceed in this way. It is plain that he is a determined and experienced litigant, but he appears to be quite unwilling to heed the authoritative findings of successive Employment Judges in his claims.

30. I am left with little doubt that he has acted unreasonably in raising these proceedings, and further, that he has acted vexatiously in so doing, in the sense that his actions have led the first respondent to incur yet further expense and inconvenience in having to respond to those allegations contained within this claim.

31. Turning then to the question of whether the claimant's conduct of these proceedings has been vexatious, scandalous, abusive or otherwise unreasonable, I have already found, particularly at paragraph 84 of the Judgment, that *"the claimant's conduct of these proceedings has been unreasonable and, further, vexatious, in the sense that it is clear that the claimant's actions have led to considerable expense and inconvenience on the part of the respondents. I do not take account of the claimant's previous proceedings against the respondents or any of them in addressing this particular point. The question is whether or not the manner in which he has conducted these proceedings, and no other, has been unreasonable and vexatious. The manner in which he has responded to the Orders, and his failure to attend this Hearing despite being instructed that he required to do*

so, demonstrates an attitude which is dismissive and disrespectful, and in my judgment it is abundantly clear that the claimant wishes to cause the respondents as much trouble as he can in this case, without defining properly the basis for his claim before the Tribunal.”

5 32. I adhere to those conclusions, which were reached after a lengthy analysis
of the claimant's actions in these proceedings. I do not consider it
necessary to repeat the findings upon which these conclusions were
reached. There is no doubt, in my view, that the claimant has been acting in
a manner which is characterised by dismissive and disrespectful attitudes
10 directed at both the first respondent and the Tribunal, particularly but not
confined to his complete failure to respond to the Orders made by the
Tribunal.

15 33. Again, it is important to take into account the claimant's experience before
the Tribunal, in having raised previous proceedings, and to note that the
Order was set out in clear and unambiguous terms. I do not retreat from the
conclusions previously set out about the claimant's conduct, and as a result,
it is my finding that the claimant has conducted these proceedings in a
manner which is vexatious and unreasonable.

20 34. I turn then to the question of whether the application for expenses is justified
on the ground that the claims had no reasonable prospect of success.
Again, the Judgment set out my conclusions on this aspect of the case,
primarily in paragraphs 70 to 73. In my judgment, the claimant's claims,
even after he had had the opportunity to clarify and specify them, were
characterised by a lack of clarity, by a lack of reasonable prospect of
25 success as pled, by significant weakness and poor pleading and a failure to
focus and clarify their terms.

30 35. Largely due to the claimant's failure to respond properly or indeed
adequately to the Orders issued to him, the claimant's claims lacked any
reasonable prospect of success, in my judgment, which led to the
conclusion that they should be struck out.

36. Finally, it is necessary, having reached these conclusions to determine whether any award of expenses should follow from them, and if so, what amount should be awarded.

5 37. The basis upon which an award of expenses should be made in this case is, in my judgment, clear. The claimant has acted vexatiously and unreasonably not only in raising the proceedings but also in the manner in which he has conducted them. He has failed, with disregard for the authority of the Tribunal, to answer the Orders presented to him; he has failed to attend at the Preliminary Hearing fixed to decide whether or not his claim should be struck out; and he has failed to take account the previous
10 Judgments issued to him in similar circumstances by successive Employment Judges in the Edinburgh Tribunal.

15 38. That the claimant has repeatedly raised claims which have either been struck out as having no reasonable prospect of success or which have been struck out before on the basis that they have been previously determined makes it clear that he is not prepared to acknowledge the authority of the Tribunal. As I put it in the Judgment, the claimant seems to think he knows better than the Tribunal, and presses on regardless of clear intimations on a number of occasions that his claims cannot proceed.

20 39. In my judgment, while it is generally the exception that expenses awards are made against parties, and particularly unrepresented parties, in the Employment Tribunal, it is in the interests of justice to make an award against the claimant in this case as it is his actions which have led to the strike out of his claim, and to the unnecessary incurrence of expense on the
25 part of the first respondent in requiring, once more, to take time and instruct solicitors to defend such claims on their behalf. The claimant should understand that he may not continue to raise hopeless proceedings, or act in a vexatious and unreasonable manner in the course of those proceedings, with impunity. An award of expenses against the claimant -
30 and it is him against whom the award is properly made, since his actions are those which have led to this point - is an appropriate measure, to

compensate the first respondent for the cost which is an inevitable consequence of his persistently unreasonable actions.

5 40. Accordingly, it is appropriate to consider what award to make against the claimant. While it is generally considered appropriate to take into account the claimant's means to pay any award, it is not, as the first respondent has submitted, essential to do so. I would be quite prepared to do so, if any information were available to me about the claimant's means. However, in the absence of any response at all from him to this application or to the Tribunal's requests for his participation in this aspect of the process, there is
10 little information which has any bearing on my decision.

15 41. The only information which seems to me to be available and relevant is that the claimant remains in employment with the first respondent. It is not clear to me what precise status his employment has at this stage, and indeed whether or not he is currently in a period of nil pay due to an extended absence from work, but the reality is that he remains in employment with the first respondent and that that fact may be taken into account in determining what level of award to make.

20 42. I am satisfied that the first respondent has incurred the expenses sought by them properly and that they have been accurately vouched and presented to the Tribunal.

43. I have concluded, therefore, that a significant award should be made against the claimant not to penalise him but to compensate the first respondent for the consequences of unreasonable conduct in raising and conducting these proceedings.

25 44. I see no reason to reduce the figure which has been sought by the first respondent, of £3,971, which appears to me to be proportionate and justifiable in all the circumstances of this case.

45. Accordingly, I have concluded that the first respondent's application for expenses against the claimant in this case should be granted, and that the

claimant should be ordered to pay to the first respondent the sum of £3,971 in respect of those expenses.

Employment Judge: M Macleod
Date of Judgment: 27 July 2023
Entered in register: 28 July 2023
and copied to parties

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